Supreme Court, U.S.
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No. 09-1191

In the Supreme Court of the United States

ANTWON DANIELS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Did the Circuit Court improperly interpret the inevitable discovery doctrine when it affirmed the admission of evidence seized during a warrantless search, where at the time of the search the police were not actively pursuing other lawful means to obtain a search warrant?

II. PARTIES TO THE PROCEEDING

Petitioner: Antwon Daniels

Respondent: United States of America

Defendants and Appellants below: Oluwadamilola Are and Antwon Daniels

Plaintiff and Appellee below: United States of America

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V. OPINIONS BELOW

A. The Judgment in a Criminal Case is unpublished, but is attached hereto as 1A of the Appendix.

B. The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 590 F.3d 499 and is attached hereto as 64A of the Appendix.

VI. JURISDICTIONAL STATEMENT

The District Court had jurisdiction over the case below pursuant to 28 U.S.C. § 3231. Judgment was entered by the United States District Court for the Northern District of Illinois on August 3, 2007. The order of the District Court is unpublished. Appellant timely filed a Notice of Appeal on August 8, 2007. The Court of Appeals for the Seventh Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Judgment was entered by the United States Court of Appeals for the Seventh Circuit on December 30, 2009. The opinion of the Court of Appeals is reported at 590 F.3d 499. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

VII. CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

> be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

VIII. STATEMENT OF FACTS

A. Background

On October 12, 2005, a grand jury returned a twenty-seven count indictment against Petitioner Antwon Daniels ("Daniels") and seven other Co-Defendants. SA.001-030.[1] At trial, the jury found Daniels guilty of conspiracy to distribute controlled substances, 21 U.S.C. § 846 (Count 1), distribution of heroin, 21 U.S.C. § 841(a)(1) (Count 3), use of a telephone to facilitate a felony drug offense, 21 U.S.C. § 843(b) (Counts 16-17), and unlawful possession of a firearm after a felony conviction, 18 U.S.C. § 922(g)(1) (Count 11). RSA. 001. This Petition addresses Daniels' firearm conviction only.

Post-trial motions for a judgment of acquittal and new trial were denied by the court on April 12, 2007. SA. 074-088. Daniels proceeded to sentencing and was

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[1] Citations in this Brief are formatted as follows: (1) citations to the required short appendix attached to the Seventh Circuit brief are abbreviated as "RSA"; (2) citations to the separate appendix attached to the Seventh Circuit brief are abbreviated as "SA"; and (c) citations to the transcript are abbreviated as "Tr." Each abbreviation is followed by the page number cited.

sentenced to 180 months. RSA. 002. Daniels timely filed a notice of appeal.

The charges in this case arose out of an FBI investigation into drug trafficking on the South Side of Chicago, Illinois. Tr. 8. The investigation began in October 2003 and ended with multiple arrests, including Daniels', on July 19, 2005. Tr. 8. The investigation involved a wiretap on the telephone of Jerome Murray, the lead defendant, and lasted roughly two months. Tr. 12, 46. Of the over 20,000 audio "sessions" captured by the Murray wiretap, Daniels participated in approximately ten. Tr. 22-23, 35. Stemming from this surveillance, police observed Daniels on several occasions engaging in suspected drug activity, which ultimately led to a traffic stop and seizure of 49.6 grams of heroin from Daniels on January 26, 2005. Tr. 300, 303-05, 209-12, 360-76. Throughout the investigation, at no point was Daniels observed to possess or use guns or violence in the course of any drug transaction.

B. Daniels' Arrest

Based on the investigation and the January seizure of heroin from Daniels in a car, on July 19, 2005, law enforcement officers went to Daniels' home to execute an arrest warrant. 8/14/06 Tr. 371. The arresting officers did not bring with them a search warrant of any kind, including either a warrant to enter the home to arrest Daniels or a warrant to enter the home to search for contraband. F.B.I. Agent Helen Dunn acted as the team leader of nine agents for the arrest at Daniels' home. 8/14/06 Tr. 366-67, 369. Dunn knocked on the door of Daniels' one-story residence in Country Club Hills, Illinois at around 6:00 a.m. 8/14/06 Tr.

371. Daniels' wife answered the door, allowed the officers to enter the house, and told them that Daniels was in the master bedroom. 8/14/06 Tr. 371-72. The officers handcuffed Daniels while he was in the bedroom, and then took him to the living room. 8/15/06 Tr. 440.

On their way to the master bedroom, Chicago Police Officers, who were assisting the F.B.I. with the arrest, performed a protective sweep of the premises and found two children, an eight-year-old girl and a three-year-old boy, in another bedroom and brought them out into the living room. 8/14/06 Tr. 376, 409; 8/15/06 Tr. 463.

After Daniels was handcuffed and taken to the living room but before he was given his *Miranda* warnings, F.B.I. Agent Eugene Jackson asked Daniels if there were any weapons in the house. 8/15/06 Tr. 441. At the time Agent Jackson asked this question about weapons, the arrest of Daniels had been completed and the officers had control over all the occupants of the house. 8/15/06 Tr. 441. Daniels responded to Agent Jackson's question about weapons by saying that there was an AK-47 under the dresser in the bedroom. 8/14/06 Tr. 411; 8/15/06 Tr. 441. Without a search warrant, some of the officers and agents then went into the bedroom, leaving Daniels, his wife, and the two children secure in the living room with the other agents. 8/14/06 Tr. 411. In the bedroom, the agents removed a television off a large dresser, moved the dresser, and found nothing. 8/14/06 Tr. 412-13. At this point, although the arrest of Daniels was complete, and the search of the dresser area had revealed no evidence of a gun, Agent Casimer Solana began searching a closet in the bedroom.

8/14/06 Tr. 414-15, 427. Agent Solana moved a plastic bin on the floor of the closet and discovered an object wrapped in fabric. 8/14/06 Tr. 427-28. He removed the fabric and found the gun. 8/14/06 Tr. 428.

C. The Findings of the District Court and the Seventh Circuit Court of Appeals

At trial, Daniels moved to suppress (1) the heroin seized from him after a traffic stop on January 26, 2005, (2) his post-arrest statement that the gun was under his dresser in his bedroom, and (3) the gun recovered from his bedroom on July 19, 2005. The government argued that the warrantless search of Daniels' home was permissible because exigent circumstances existed, and that the gun was admissible because it would have been discovered had a warrant been obtained. The government hinged its arguments on Daniels' post-arrest statement that there was a gun under the dresser in his bedroom.

After a lengthy suppression hearing, the District Court denied the motion to suppress in its entirety. SA.036. The District Court ruled that Daniels' post-arrest statement and the gun could be admitted into evidence. In its review of the District Court's decision to admit the statement and the gun, the Seventh Circuit held that (1) Daniels' post-arrest statement was admissible because the government's questioning of Daniels – without first giving him his *Miranda* rights -- was admissible under the public safety exception; and (2) the gun was admissible due to exigent circumstances and under the inevitable discovery doctrine. Specifically, the Seventh Circuit agreed with the District Court that the fact that Daniels' spouse and children would remain in the

house after the agents left with Daniels, and would be free to retrieve the weapon, thereby endangering the lives of the agents as they exited the premises, constituted "exigent circumstances." Additionally, the Seventh Circuit held that pursuant to its "harmless error" approach to the inevitable discovery doctrine, the gun was admissible because, based on Daniels' post-arrest statement, the government had proven that "a warrant would certainly, and not merely probably, have been issued had it been applied for." *United States v. Are*, 590 F.3d 499, 507 (7th Cir. 2009). Moreover, by admitting the gun under the inevitable discovery exception, the Seventh Circuit rejected the argument that active pursuit of a warrant was required, notably departing from other Circuits that expressly require "active pursuit."

IX. ARGUMENT

Because there is a conflict between the Circuit Courts of Appeals, this Court should determine if "active pursuit" of a warrant is necessary for the inevitable discovery doctrine to apply.

A. A SIGNIFICANT CIRCUIT SPLIT EXISTS AS TO WHETHER APPLICATION OF THE INEVITABLE DISCOVERY EXCEPTION REQUIRES ACTIVE PURSUIT OF A SEARCH WARRANT.

Following this Court's adoption of the inevitable discovery exception to the exclusionary rule in *Nix v. Williams*, a Circuit split has developed among various Courts of Appeals as to whether the inevitable discovery exception applies absent evidence that law

enforcement agents were in "active pursuit" of a warrant prior to the warrantless search and seizure. *Nix v. Williams*, 467 U.S. 431 (1984). The better reasoned cases limit application of the inevitable discovery exception to the exclusionary rule to those cases where there is evidence that police were actively pursuing other lawful means to obtain the evidence at the time of the warrantless search.

To ensure that defendants receive the protections of the Fourth Amendment, a neutral magistrate *must* determine whether probable cause exists to authorize a search of a defendant's home. The Seventh Circuit, however, has adopted a rule that essentially eliminates the need for police to obtain, or even apply for, a warrant before searching a defendant's home if the police feel that "a warrant would certainly, and not merely probably, have been issued had it been applied for." *United States v. Tejada*, 524 F.3d 809, 813 (7th Cir. 2008). In *United States v. Tejada*, the Seventh Circuit rejected both confining application of the exception to instances where the government was actively pursuing a warrant prior to the unlawful conduct, and application of the exception in any case "in which the police have probable cause to obtain a warrant." *Id.* at 812-13. Instead, the Seventh Circuit adopted a "harmless error" approach to the inevitable discovery exception by requiring the government to prove that a "warrant would certainly, and not merely probably, have been issued had it been applied for." *Id.* at 813. This rule dangerously removes the neutral magistrate from the decision-making process, as it effectively substitutes the police in the place of the magistrate. Under the "harmless error" approach, if a police officer feels that it is likely that a court will later say that probable cause "certainly" existed, then under

the Seventh Circuit's expansive position regarding inevitable discovery police are both allowed and encouraged single-handedly to circumvent the need to apply for a search warrant prior to conducting a search. What results is, in essence, an exception to the warrant requirement for the obviously guilty.

Because such an approach certainly was not what this Court intended when it adopted the inevitable discovery exception to the exclusionary rule in *Nix*, this Court should restrict the Seventh Circuit's interpretation and mandate that "active pursuit" be required for the inevitable discovery exception to apply. *Nix*, 467 U.S. at 432. In *Nix*, this Court held that the exclusionary rule should not apply to evidence derived from a violation of the defendant's constitutional rights if such evidence would inevitably have been discovered in the absence of official misconduct. *Id.* Recognizing the dangers of an expansive exception to the exclusionary rule, *Nix* further instructed that application of the inevitable discovery exception "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Id.* at 444 n.5.

Yet, despite this Court's express effort to limit the parameters of the inevitable discovery exception, it could not have foreseen the aggressive expansion that some Circuit Courts – the Seventh Circuit, in particular – would later perilously adopt. In this case, the Seventh Circuit, by applying its "harmless error" test, ignored this Court's clear direction in *Nix* that application of the doctrine should not involve speculation, and affirmed the application of the doctrine even though it had to speculate as to how and whether the government might have sought or

received a search warrant. In so doing, the Seventh Circuit disagreed with those Courts of Appeals that have held that actual "active pursuit" of a warrant, as opposed to a speculative "likely successful" pursuit of a warrant, is required to justify application of the inevitable discovery exception.

The disagreement between the Circuits regarding whether "active pursuit" is required focuses on the efforts of law enforcement to obtain a warrant prior to the initiation of the otherwise unlawful search. The Courts of Appeals that require "active pursuit" carefully look to see whether at the time an unlawful search began, the police had already undertaken other lawful steps, such as applying for a search warrant, to ensure that the evidence would actually, rather than likely, have inevitably been obtained. Contrastingly, the Courts that do not require "active pursuit," such as the Seventh Circuit, eliminate the need to apply for a warrant altogether by merely requiring prosecutors to prove that at the time the warrantless search began, the police had sufficient probable cause to get a search warrant.

In this case, by upholding the admission of the gun, the Seventh Circuit subverted the warrant application requirement and Daniels' constitutional rights under the Fourth Amendment. Based on Daniels' statement that there was a gun under the dresser, the police, without actively pursuing a search warrant, not only searched under the dresser, but also unlawfully continued to search the closet. In so doing, the police did not follow the Fourth Amendment's directive to seek issuance of a warrant from a neutral magistrate, but instead conducted a search that clearly exceeded the scope of any probable cause. This situation both

highlights the ambiguity of the standard outlined in *Nix* and urgently calls for this Court to end the significant disagreement between the Circuits over whether "active pursuit" is required in order for the inevitable discovery doctrine to apply.

Currently, a considerable minority of Circuits have prudently adopted a narrow approach to the inevitable discovery exception that places reasonable limits on the potentially limitless application of the rule. In the Second, Fifth, Eighth, and Eleventh Circuits, the inevitable discovery exception applies only when the government can prove that, at the time it performed a warrantless search, it was already actively pursuing lawful means that would lead to the discovery of the evidence. *See United States v. Virden*, 488 F.3d 1317, 1323 (11th Cir. 2007) (holding that the inevitable discovery rule did not apply because the prosecution could not show that officers were actively pursuing any lawful means at the time of the illegal conduct); *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984) (applying the inevitable discovery exception only if the police were pursuing a lawful means of discovery "*prior* to the occurrence of the illegal conduct"); *United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997) (recognizing that to "succeed under the inevitable-discovery exception ... the government must prove ... (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation"); *United States v. Eng*, 971 F.2d 854, 861 (2d Cir. 1992) ("We agree with the Fifth Circuit's observation that: 'The alternative means of obtaining the evidence must at least be in existence

and, at least to some degree, imminent, if yet unrealized.'") (quoting *United States v. Cherry*, 759 F.2d 1196, 1205 n.10 (5th Cir. 1985)).

According to this narrow approach, the government properly bears a heavy burden to demonstrate that "the lawful means which made discovery inevitable were being *actively pursued prior to* the occurrence of the illegal conduct." *United States v. Virden*, 488 F.3d at 1322 (quoting *Jefferson v. Fountain*, 382 F.3d 1286, 1296 (11th Cir. 2004) (emphasis added)). *See United States v. Cabassa*, 62 F.3d 470, 473 (2d Cir. 1995) (discussing how the "extent to which the warrant process has been completed" at the time of the unlawful conduct is of "great importance").

The rationale for this approach is that, without it, the exclusionary rule and the warrant requirement would become meaningless. *See United States v. Virden*, 488 F.3d at 1322 ("Any other rule would effectively eviscerate the exclusionary rule, because in most illegal search situations the government could have obtained a valid search warrant had they waited or obtained the evidence through some lawful means had they taken another course of action."); *United States v. Satterfield*, 743 F.2d at 846 ("Because a valid search warrant nearly always can be obtained after the search has occurred, a contrary holding would practically destroy the requirement that a warrant for the search of a home be obtained *before* the search takes place.") (emphasis in original).

Yet, despite the danger of destroying the warrant requirement, several Circuits – such as the First, Fourth, Sixth, Ninth, and Tenth Circuits – have rejected a blanket active pursuit requirement. *See*

United States v. Silvestri, 787 F.2d 736, 744, 746 (1st Cir. 1986) (drawing a distinction between "warrantless searches that are never followed by a warrant and warrantless searches that are followed by a warranted search," and observing that the active pursuit requirement "may ... be appropriate in illegal search cases where no warrant is ever obtained"); *United States v. Kennedy*, 61 F.3d 494 (6th Cir. 1995) (active pursuit is not required where independent, routine procedures would have inevitably uncovered the evidence); *United States v. Larsen*, 127 F.3d 984, 987 (10th Cir. 1997) (stating that independent lines of investigation do not already have to be underway, because "it is possible for an investigation that begins after the violation to be independent of the illegal investigation").

However, even the Circuits that have adopted this expansive view of *Nix* have expressed hesitation to apply the inevitable discovery exception in situations where the government was not actively pursuing lawful means prior to the unlawful search. Specifically, the Fourth Circuit has cautioned against the application of the inevitable discovery exception absent active pursuit. *See United States v. Allen*, 159 F.3d 832, 841 (4th Cir. 1998) ("[t]he existence of probable cause for a warrant, in and of itself and without any evidence that the police would have acted to obtain a warrant, does not trigger the inevitable discovery doctrine any more than probable cause, in and of itself, renders a warrantless search valid").

Similarly, the Ninth Circuit has observed that it "has never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not

attempt to obtain a warrant." *United States v. Mejia*, 69 F.3d 309, 320 (9th Cir. 1995). The court added, "[T]o 'excuse the failure to obtain a warrant merely because the officers had probable cause and could have obtained a warrant would completely obviate the warrant requirement.'" *Id.* (quoting *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986)). The Tenth Circuit also seemingly holds that one of the prerequisites to applying the inevitable discovery exception is that law enforcement agents must take steps *before* the unlawful search to obtain a search warrant. *United States v. Souza*, 223 F.3d 1197, 1203 (10th Cir. 2000) (stating that "[w]hile the inevitable discovery exception does not apply in situations where the government's only argument is that it had probable cause for the search, the doctrine may apply where, in addition to the existence of probable cause, the police had taken steps in an attempt to obtain a search warrant").

Recognizing that this significant split exists, there is an urgent need for this Court to revisit *Nix* and properly define the parameters of the inevitable discovery doctrine.

B. THIS COURT SHOULD ADOPT THE ACTIVE PURSUIT REQUIREMENT, BECAUSE ANY OTHER RULE WOULD EVISCERATE THE EXCLUSIONARY RULE AND RENDER THE FOURTH AMENDMENT WARRANT REQUIREMENT MEANINGLESS.

This Court should mandate that the government prove that at the time it performed a warrantless search it was actively pursuing lawful means that

would lead to the discovery of the evidence. Any rule that does not require the government to prove that it was actively pursuing lawful means that would lead to the discovery of the evidence would effectively eviscerate the exclusionary rule and render the Fourth Amendment warrant requirement meaningless, at least in cases where the police thought the defendants were "obviously guilty," or probable cause easy to prove.

The *Nix* majority did not clearly express the boundaries of the inevitable discovery exception apart from its analysis of the facts before it. Nonetheless, the Court's analysis of those facts does not justify the expansive interpretation of the inevitable discovery exception adopted by the Seventh Circuit. To ensure that the Fourth Amendment protections against search and seizure do not become meaningless, this Court should adopt the narrow approach applied by the Second, Fifth, Eighth, and Eleventh Circuits. Without this rule, "our constitutionally-mandated preference for substituting the judgment of a detached and neutral magistrate for that of a searching officer...would be greatly undermined." *United States v. Satterfield*, 743 F.2d at 846-47. Moreover, "[i]f the inevitable discovery exception can be applied only on the basis of the [government's] mere intention to use legal means subsequently, the focus of the inquiry would hardly be on historical fact." *United States v. Cherry*, 759 F.2d 1196, 1205 n.10 (5th Cir. 1985). The Fourth Amendment protects against the admission of illegally obtained evidence and police misconduct. As the Fifth Circuit reasoned:

> [W]hen the police have not been in active pursuit of an alternate line of investigation that

> is at a minimum supportable by leads, the general application of the inevitable discovery exception would greatly encourage the police to engage in illegal conduct because (1) the police would usually be less certain that the discovery of the evidence is "inevitable" in the absence of the illegal conduct and (2) the danger that the evidence illegally obtained may be inadmissible would be reduced. While suppression in such a case may put the prosecution in a worse position because of the police misconduct, a contrary result would cause the inevitable discovery exception to swallow the rule by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means.

Id. at 1204-05.

Furthermore, requiring active pursuit as a necessary condition to invoke the inevitable discovery exception will protect, rather than destroy, the Fourth Amendment requirement to obtain a warrant before searching a home. As this Court stated in *McDonald v. United States*, 335 U.S. 451 (1948):

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce

> the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals... And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

Id. at 455-56.

In this case, the lower courts' decisions upheld the admissibility of evidence unlawfully seized from Daniels' home merely because the law enforcement agents *could have* obtained authorization to search. This application of the inevitable discovery doctrine removes the "magistrate [from] pass[ing] on the desires of the police before they violate the privacy of the home." *Id.* at 456.

If this Court adopts the active pursuit requirement, the gun found in Daniels' home must be suppressed. The fact that the agents, despite knowing of Daniels' prior drug and weapon offenses, executed the arrest warrant in Daniels' home without a search warrant, gives little weight to the Seventh Circuit's argument that Daniels' unlawfully obtained statement, coupled with his prior convictions, were sufficient reasons for the officers to search the home without a warrant. Furthermore, the stated concern – that Daniels' wife, his three year-old son or eight year-old daughter (none of whom gave the officers any problems during the

arrest and about whom the officers had no prior information that suggested that they were dangerous) would have retrieved a gun and started shooting at the heavily armed and experienced law enforcement officers – was nothing more than pure speculation. To the extent that the officers were concerned about being attacked as they departed, some of the officers could have stayed behind to cover their departure and waited until the officers returned with a search warrant. Finally, it is worth noting that in this case, no steps were ever taken to attempt to secure a search warrant, nor did a warrant ultimately ever issue.

X. CONCLUSION

This Court should protect the Fourth Amendment by mandating an active pursuit requirement and prevent lower Courts from opening the door for law enforcement agents to freely search without a warrant any time they believe probable cause exists. By issuing a writ of certiorari, this Court could resolve this very significant split and force the Seventh Circuit to abandon its "harmless error" approach. In so doing, this Court would assure that the protections afforded by the Fourth Amendment will apply equally to all citizens of the United States, regardless of which Federal Circuit may review their appeals in a search and seizure case.

In this case, because the officers performed an illegal search without actively pursuing another lawful means to obtain the gun, the gun should not have been admitted into evidence at Daniels' trial. Therefore, for the reasons stated herein, Daniels' weapon conviction should be reversed.

Respectfully Submitted,

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